UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LARRY DANELISHEN, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER AT07528910492 DATE: FEB 06 1990

Larry Danelishen, Middleburg Heights, Ohio, pro se.

Sam Cruse, Savannah, Georgia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant filed a timely petition for review of an initial decision issued on May 24, 1989, dismissing for lack of jurisdiction his petition for appeal from his allegedly coerced resignation. For the reasons discussed in this Opinion and Order, the Board DENIES the appellant's petition for review because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and

Order, still DISMISSING the appellant's appeal for lack of jurisdiction.

BACKGROUND

On March 19, 1987, pursuant to an arbitration award addressing the agency's removal action, the appellant resigned from his position as a Distribution Clerk with the Hinesville, Georgia, Post Office. In his award, the arbitrator noted that he had applied mediation techniques to effect an agreement between the parties. The agreement provided that, beyond resigning, the appellant would withdraw all pending complaints, charges, and grievances, and would not file any future complaints, charges, or grievances, relating to his employment at the Hinesville Post Office. In part, the agency agreed to remove from the appellant's personnel files the records relating to the removal action. *See* Initial Appeal File (IAF), Tab 4, Subtabs 4A-4D.

The appellant filed a petition for appeal with the Board's Atlanta Regional Office on March 27, 1989, from his allegedly involuntary resignation. He asserted that both the arbitrator and the agency coerced him into resigning as a term of the settlement agreement and that the settlement agreement illegally restrained him. In addition, he argued that the agency's actions (presumably those with regard to his allegedly forced resignation, which he equates with removal) were illegal and also violated the National Agreement. He asserted, *inter alia*, that he had complied with all terms of

the arbitration/settlement agreement and that the agency also must comply with the terms of the "arbitration resolution." He concluded with a request for reemployment. *See* IAF, Tab 1. Because it appeared that the Board lacked jurisdiction over the appeal, and that the appeal was untimely filed, the administrative judge ordered the appellant to submit evidence and argument to establish the Board's jurisdiction and the timeliness of the appeal. In response, the appellant asserted that his previous appeal[1] concerning the agency's refusal to reinstate him was germane to the instant appeal, that the agency had violated various regulations, including those of the Merit Systems Protection Board, that he had been denied notice of his appeal rights, that the agency had discriminated and retaliated against him, and, generally, that he had been the victim of collaboration among, and collusion by, the agency, the union, and the arbitrator. *See* IAF, Tab 3.

In an initial decision dated May 24, 1989, the administrative judge dismissed the appeal for lack of jurisdiction. She noted that the appellant pursued his removal through the union grievance/arbitration process rather than through an appeal to the Board, that the arbitrator declared the settlement agreement to be the award of the arbitrator, and that, because the arbitrator retained

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1 *Danelishen v. United States Postal Service*, MSPB Docket No. CH34438910175 (July 13, 1989) (the Board denied the appellant's petition for review of the initial decision that found that the agency's refusal to rehire the appellant was not an action appealable to the Board).

jurisdiction to resolve any questions or disputes concerning the effect or application of the settlement agreement, any challenge to the agreement must be made to the arbitrator, not to the Board. The administrative judge also found that the appellant's appeal, insofar as it could be viewed as an appeal of his removal from the Postal Service in 1986, was untimely by nearly 3 years, and that a waiver of the filing deadline was inappropriate in view of the appellant's having been informed of his appeal rights prior to choosing to use the grievance/arbitration process. The administrative judge also noted that, in the absence of an otherwise appealable action, the appellant's allegation of a prohibited personnel practice did not confer jurisdiction on the Board.

The appellant has filed a timely petition for review in which he reiterates the arguments he raised below and also alleges that: (1) The administrative judge improperly rejected certain of his submissions; (2) he filed a discrimination complaint and therefore may appeal the arbitrator's decision; (3) he first became aware of the "foul play," i.e., collusion among the agency, the union, and the arbitrator, concerning the arbitration on "July 29, 1989" (*sic*); (4) good cause exists for his untimely-filed appeal to the Board; and (5) the administrative judge was biased against him. The appellant has resubmitted various documents and has included others seemingly unrelated to his appeal, including transcripts that purport to snow his attendance at the United

States Military Academy and at Cuyahoga Community College. See Petition for Review File (PFR), Tabs 1 and 2.

ANALYSIS

To the extent that the appellant is attempting to repudiate the settlement agreement, we note that the Board has no authority to enforce or invalidate a settlement agreement that has not been incorporated into the record of a Board appeal of an action over which the Board has jurisdiction.[2] The Board, however, may examine the circumstances surrounding the settlement agreement in considering whether the appellant's resignation was coerced, as he now claims.

Employee-initiated actions, such as a transfer between agencies, resignation, or retirement, are presumed to be voluntary unless the appellant presents sufficient evidence to establish that the action was obtained through duress or coercion or shows that a reasonable person would have been misled by the agency. *See Kocp v. Federal Emergency Management Agency*, 16 M.S.P.R. 605, 607 (1983). In order to show a proper basis for finding Board jurisdiction over the alleged involuntary resignation, the appellant would have to show that he involuntarily accepted the terms of the other side, that circumstances permitted no other alternative, and that the circumstances were the result of coercive acts of the

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[2] This is not to say that, in an appeal over which the Board properly has assumed jurisdiction, the Board cannot apply an agreement entered into by the parties. *See, e.g., Powell v. Department of the Treasury*, 32 M.S.P.R. 221, 224 (1987).

other party. *See, e.g., Nies v. United States Postal Service*, 32 M.S.P.R. 510, 512 (1987).

We note that, by an Acknowledgment Order dated March 31, 1989, the administrative judge informed the appellant of his burden of proving that his resignation was not voluntary but was the result of duress, coercion, or misrepresentation. *See* IAF, Tab 2. In order to show that the resignation was involuntary as a result of misrepresentation, the appellant would have to show that the agency made misleading statements upon which he relied. *See Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). We also note that the appellant responded with bare allegations, but no evidence, of collusion and conspiracy among the agency, the arbitrator, and the union. *See* IAF, Tab 3; *Gleaves v. Department of the Navy*, 36 M.S.P.R. 558, 560 (1988). In fact, the record shows that the appellant signed a letter in accordance with the terms of the "jointly made" arbitration agreement. *See* IAF, Tab 4, Subtab 4Q. We find, therefore, that the appellant has not met his burden in this appeal and that the administrative judge properly found that the Board lacks jurisdiction over this matter.

We note that the appellant's submissions are often contradictory and unsupported. His allegation that the administrative judge erred in rejecting certain submissions is without merit. The record shows that the administrative judge properly informed the appellant that the record would close on March 31, 1989. The appellant's April 30, 1989, and May 8,

1989, letters were filed more than 25 days after the close of the record and thus were properly rejected by the administrative judge. *See* IAF, Tab 2; *Dougherty v. Office of Personnel Management*, 36 M.S.P.R. 117, 120 (1988).

To the extent that the appellant is claiming that the Board has jurisdiction to review the arbitration agreement under 5 C.F.R. §§ 1201.3(b)(3) and 1201.154(b), that filing a discrimination complaint shows that he has claimed prohibited discrimination, and that the administrative judge erred in not addressing that claim, the appellant is mistaken. The cited regulatory provisions derive from 5 U.S.C. § 7121, which provides for Board review of arbitrators' decisions in cases involving claims of prohibited discrimination. However, the Postal Service is not covered by that provision. *See Hall v. United States Postal Service*, 26 M.S.P.R. 233, 236 (1985). Thus, the appellant's reliance on 5 C.F.R. §§ 1201.3(b)(3) and 1201.154(b) is misplaced. Moreover, the administrative judge correctly found that, absent an otherwise appealable action, a claim of prohibited discrimination does not confer jurisdiction on the Board. *See* Initial Decision at 3-4; *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd sub nom. Wren v. Merit Systems Protection Board*, 681 F.2d 867, 871-73 (D.C. Cir. 1982) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction).

Finally, the appellant has not supported his allegation that the administrative judge was biased against him. In making a claim of bias or prejudice against an administrative

judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). The mere fact that the administrative judge dismissed the appellant's appeal for lack of jurisdiction, without addressing the merits of the removal action that resulted in his resignation, does not support his claim of bias. *See Howard v. Office of Personnel Management*, 31 M.S.P.R. 617, 620 (1986), *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987)(Table).

In the absence of any argument or persuasive evidence to the contrary, we find that the appellant has merely disagreed with the administrative judge's jurisdictional finding.[3] Furthermore, as the administrative judge properly noted, the arbitrator retained jurisdiction over the settlement agreement, and any challenge to that agreement must be directed to the arbitrator. *See* IAF, Tab 4, Subtab 4D.

ORDER

This is the Board's final order in this appeal. *See* 5 C.F.R. § 1201.113(c).

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[3] The appellant disputes the administrative judge's timeliness finding, implying that his appeal was, in fact, timely because the agency never informed him of his appeal rights to the Board. However, we note that the agency's June 21, 1986, letter of decision to remove the appellant did inform the appellant of his appeal rights to the Board. *See* IAF, Tab 4, Subtab 4Q. In any event, the administrative judge's timeliness finding was collateral to her finding that the Board lacked jurisdiction over the appellant's alleged involuntary resignation. The administrative judge did not, in fact, make an adverse finding as to the timeliness of the appellant's appeal of his alleged involuntary resignation.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.